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IN THE

Supreme Court of the United States

October Term, 1951

No. ~~600~~ 31

UNITED STATES OF AMERICA ex rel.
JAMES SMITH,
Petitioner

v.

DR. FREDERICK S. BALDI, Superintendent
Philadelphia County Prison

On Certiorari to the United States Court of Appeals
for the Third Circuit.

BRIEF OF THE ATTORNEY GENERAL OF PENNSYLVANIA FOR THE RESPONDENTS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 669

United States of America ex rel.
James Smith,
Petitioner,

v.

Dr. Frederick S. Baldi, Superintendent
Philadelphia County Prison

On Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE ATTORNEY GENERAL OF PENNSYLVANIA FOR THE RESPONDENTS

OPINIONS BELOW

1. The opinion of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania (211a-227a; 1a-20a, Appx. to Respondent's Brief) is not reported.

2. The opinion of the Supreme Court of Pennsylvania affirming the judgment and sentence of the Court of Oyer and Terminer of Philadelphia County is reported in 362 Pa. 222, 66 A. 2d 764.

3. The opinion of the District Court at M-1334—the first application—is reported in 87 F. Supp. 339.

4. The opinion of the Circuit Court of Appeals affirming the dismissal of the application at M-1334 is reported in 181 F. 2d 847.

5. The opinion of the Supreme Court of Pennsylvania, dismissing the petition for a writ of habeas corpus, is reported in 364 Pa. 93, 71 A. 2d 107, cert. den. 340 U. S. 812.

6. The opinion of the District Court, in this proceeding—the second—is reported in 96 F. Supp. 100.

7. The opinion of the Circuit Court of Appeals, affirming the dismissal of the application, is reported in 192 F. 2d 540.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 26, 1951. The petition for a writ of certiorari was filed. The petition was granted on March 24, 1952. The jurisdiction of the court is invoked under Section 1254(1) of The Judicial Code, 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a district court should entertain an application for a writ of habeas corpus by a person in custody pursuant to a state criminal judgment where the records in the trial, appellate and collateral proceedings, reveal that

(1) The applicant was represented in the trial and appellate proceedings by skillful and competent counsel;

(2) The issues presented by the application were apparent on the face of the record and could have been, but were not, raised in the appellate proceedings; and

(3) The issues presented by the application had been presented to the highest State court in a collateral habeas corpus proceeding, had been adjudicated by that Court, and this Court declined to review the judgment of the State court.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE JUDICIAL CODE, 28 U.S.C.

"§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the

district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or"

"§ 2243. Issuance of writ; return; hearing; decision

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

"The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

"The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

"When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

"The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

"The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

"§ 2254. State custody; remedies in State courts

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has ex-

hausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

STATEMENT [1]

This is an application for a writ of habeas corpus by a person under a sentence of death pursuant to a judgment of the Court of Oyer and Terminer of Philadelphia County, Pennsylvania at No. 384 February Term, 1948 (227a), opinion (211a-227a), affirmed by the Supreme Court of Pennsylvania, opinion reported at 362 Pa. 222, 66 A. 2d 764.

Following a denial of commutation of sentence by the Pennsylvania Board of Pardons on September 21, 1949, an oral application for a writ of habeas corpus was made to Honorable George A. Welsh, District Judge, United States District Court for the Eastern District of Penn-

[1] As used herein, the legend (a) indicates the page at which the information may be found in the printed records before the Supreme Court of Pennsylvania at No. 137 January Term, 1949, sub nom **Commonwealth of Pennsylvania v. James Smith, Appellant**, opinion reported at 362 Pa. 222, 66 A. 2d 764. The legend (N.T.) indicates the page at which the information may be found in the testimony taken before District Judge Welsh in the first proceeding at M-1334, sub nom **United States of America ex rel. James Smith v. Warden of Western State Penitentiary.**

sylvania, on September 24, 1949. District Judge Welsh issued a rule to show cause and a stay of execution and directed the respondent, the Warden of the Western Penitentiary, to produce the petitioner before the Judges of the United States District Court for the Eastern District of Pennsylvania on October 4, 1949. Prior to the issuance of the order, the petitioner had been removed from the Philadelphia County Prison to the electrocution building of the Western Penitentiary,[2] located in Centre County, Pennsylvania, which is within the territorial jurisdiction of the United States District Court for the Middle District of Pennsylvania.

After argument before all the judges for the Eastern District, the Court directed that testimony be taken before District Judge Welsh on the issues presented by the petition.[3]

Thereafter, the District Court dismissed the writ on the grounds that when the written petition was presented to the Court, neither the pe-

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[2] Section 4, Act of June 19, 1913, P. L. 528, 19 Purdon's Penna. Stat. Annotated, Section 1124.

[3] Trial defense counsel testified for the petitioner. Judges Guerin, Sloane and Carroll, who had heard the evidence on petitioner's plea of guilty, and Doctor Baldi, Superintendent of the Philadelphia County Prison, one of the respondents herein, testified for the respondent.

titioner nor his custodian was within the jurisdiction of the District Court for the Eastern District, opinion reported at 87 F. Supp. 339. District Judge Welsh dissented. The Circuit Court of Appeals affirmed, opinion reported at 181 F. 2d 847.

In the interim between the decisions by the District Court and the Circuit Court of Appeals, an application for a writ of habeas corpus was made to the Supreme Court of Pennsylvania at 302 Misc. Docket No. 9, Eastern District (R. 4-12, No. 818 October Term, 1949, Supreme Court of the United States, transferred to No. 70 October Term, 1950) attacking the constitutional validity of the judgment on the same grounds asserted in the instant proceeding (par. 1, 2a, Appx. Appellant's Brief in the Court below). The respondents filed an answer, in which the proceedings in the District at M-1334 were specifically incorporated therein by reference (par. 1, p. 17, Tr. R. at No. 818 October Term, 1949—Supreme Court of the United States, supra). The return of the Warden of the Western Penitentiary, a copy of which was served on petitioner's counsel, was accompanied by copies of the records in all of the prior proceedings, including the testimony taken before District Judge Welsh at M-1334 (30a, Appx. to Respondent's Brief). After argument before a majority of

the Supreme Court of Pennsylvania (Maxey, C.J., and Stern, Stearne and Jones, JJ.)[4] the petition was refused, opinion reported at 364 Pa. 93, 71 A. 2d 107.[5]

A petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania dismissing the petition for writ of habeas corpus was filed in this Court at No. 818 October Term, 1949, transferred to No. 70 October Term, 1950, and denied on October 9, 1950 (340 U. S. 812). Within a matter of a very few hours (par. 2, 2a, appx. Appellant's Brief in the Court below) a *second* application for a writ of habeas corpus was made to District Judge Welsh who again issued a rule to show cause and a stay of execution (19a. appx. Appellant's Brief in the Court below). The Attorney General of Pennsylvania filed an answer in which the prior proceedings were "specifically incorporated by reference in this proceeding" (par. 1, 21a appx. to Appellant's Brief in the Court below) and

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[4] 364 Pa. 94, 71 A. 2d 108.

[5] "In the instant case we find nothing in this record which convinces us that this relator was insane when he committed the murder charged or when he pleaded guilty or at the time he was sentenced to death. The relator has not in any stage of the proceedings been denied due process of law. The petition for writ of habeas corpus is refused." (364 Pa. 119; 71 A. 2d 120.)

two petitions—one joining the Warden of Western Penitentiary as a party respondent (34a appx. to Respondents' Brief), and the other requesting that a full bench be convened (66a, id.). The first petition was granted[6] and the other denied.[7]

The District Court, in an opinion by District Judge Bard, joined in by Kirkpatrick, Chief Judge, and McGranery and Grim, District Judges, opinion reported at 96 F. Supp. 100, declined to entertain the application on the ground that all the issues presented in the petition had been raised in and decided by the Supreme Court of Pennsylvania in the application for a writ of habeas corpus in that Court, and, since this Court had declined to review the judgment of the Supreme Court of Pennsylvania, it would be unseemly for the District Court to do so. District Judges Welch, Ganey and Clary dissented (87 F. Supp. 105).

The Circuit Court of Appeals, in an opinion by Goodrich, Circuit Judge, joined in by Maris,

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[6] The opinion of the District Court would indicate that the caption was amended to include the Warden of Western Penitentiary. Petitioner, however, did not take cognizance of this either in the Court below or in this Court.

[7] 96 F. Supp. 101.

Kalonder and Hastie, JJ., reported at 192 F. 2d 540, affirmed the judgment of the District Court on the ground that the petition did not state a cause of action. Chief Judge Biggs and McLaughlin and Staley, JJ., dissented (192 F. 2d 549).

This Court granted certiorari.

FACTS

The petitioner, James Smith, was indicted in the Court of Oyer and Terminer of Philadelphia County, Pennsylvania, at No. 384 February Term, 1948, for the murder of John Haines, a taxi driver, on January 15, 1948. Herbert S. Levin, Esquire, a member of the Philadelphia Bar, was, on the day prior to petitioner's arraignment, retained by his family to represent him. The petitioner, however, was arraigned on February 25, 1948, before Mr. Levin had either entered his appearance or informed the Commonwealth of his representation of the appellant, and, upon advice of court appointed counsel, a plea of **not guilty** was entered to the indictment and a continuance granted.

As a result of interviews with the petitioner and members of his family, Mr. Levin ascertained that the petitioner had, in 1945, been confined in a mental institution in the State of New York, and, prior thereto, had been treated for a mental disorder while serving in the Armed Forces of the United States. He, Levin, claims to have zealously and industriously, but unsuccessfully, endeavored to procure copies of **records** from the Brooklyn State Hospital, Brooklyn, New York, and the United States Army authorities with respect to the appellant's prior mental history.

The indictment was listed for trial before Sloane, J., on March 17, 1948 (N.T. 194), but was postponed to the April Trial Term, on counsel's application, for the reason that he had not been able to secure the desired evidence from New York State (N.T. 195), at which time, counsel suggested the appointment of a commission under Section 308 of the Mental Health Act of 1923, Act of July 11, 1923, P.L. 998, as amended, 50 Purdon's Penna. Statutes Annotated Section 48, to examine the appellant. Judge Sloane called counsel's attention to a decision, presumably **Commonwealth v. Dunn,** 47 D. & C. Reps. 685 (1943), per Sloane, J., in which it had been ruled that, under the foregoing statute, only officers in charge of the institution where the prisoner is being detained are

proper petitioners.[8] Accordingly, Judge Sloane informed counsel that he would contact Dr. Frederick S. Baldi, physician at the Philadelphia County Prison, concerning possible institution of proceedings under under Section 308 of the Mental Health Act of 1923, supra (N.T. 195-196), which he did. Dr. Baldi, however, was of opinion that the petitioner was **not insane** and, therefore, refused to request the appointment of a commission to investigate his sanity (N.T. 199).[9] On March 19, 1948 (3a), a petition (228a-231a) was presented to Flood, J., who was then presiding in Current Motion Court, for the appointment of a commission to inquire into the petitioner's mental condition. The petition was dismissed on April 2, 1948 (3a), for the reason that the petitioner (counsel) was not a proper party petitioner. The indictment was then listed for trial on April 20, 1948 (N.T. 216), before Kun, J. Having been unable to secure the desired evidence from the mental institutions in the State of New York, and having concluded that he had done all he could do in the circumstances

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[8] See also, **Commonwealth v. Barnes**, 280 Pa. 351, 124 A. 636 (1924); **Commonwealth v. Green**, 346 Pa. 172, 174, 29 A. 2d 491 (1943).

[9] Mr. Chief Justice Maxey in his opinion in **Commonwealth ex rel. Smith v. Ashe et al.**, supra, at p. 115 of 364 Pa. observed that mandamus would lie to prevent an abuse of discretion.

to obtain it, and believing that counsel appointed by the court would have resources not available to him, Mr. Levin prepared and presented a petition for leave to withdraw his appearance (N.T. 216), which was allowed by the Court on April 15, 1948 (N.T. 220). Mr. Levin and Harry S. Berkowitz, Esquire, were then appointed by Judge Kun to represent the appellant (Ia, N.T. 222). The trial was continued to May 24, 1948, at which time it was listed for trial before Lewis, J., and again continued (N.T. 228) because counsel had been unable to secure the evidence from New York State and the authorities of the United State (N. T. 228). It was then listed for trial on June 22, 1948, before Mawhinney, J., again continued (N.T. 229) and next listed for trial on September 21, 1948 (N.T. 230) before Guerin, J.

On the day the case was listed for trial—about two weeks prior to September 21, 1948—at the request of the prosecuting attorney (N. T. 278), Judge Guerin conferred with him and petitioner's counsel in the Court's robing room (N.T. 278), for the first time, with respect to the trial of the indictment (N.T. 278), at which time, in the words of Judge Guerin, petitioner's counsel

> "presented a situation indicating we could not go on with the trial of the case

without the advantage of testimony from the hospital records in Brooklyn and in New York, that it was represented by counsel for the defendant [petitioner] that they had endeavored to obtain the voluntary appearance of the officials together with their records, and that had been refused; they said it would be necessary for them to resort to a petition under the Uniform Subpoena Act, with the allowance of the petition and the service of the petition, and then procure a proper order in the New York Court, which would require a matter of six or seven weeks"

(N.T. 278-279).

He, Judge Guerin, then agreed to permit

"the case to be called and not follow the usual custom, but continue its trial until its termination and that * * * [he] would permit the Commonwealth to introduce its evidence and * * * then set a day after allowance of the petition at which time the records could be brought from New York" (N. T. 279).

Petitioner's counsel then informed him that

"**they would enter a plea of guilty generally,** and request * * * [him] to obtain two fellow Judges to sit with * * * [him] and

hear the trial on the plea of guilty generally" (N.T. 279).

Pursuant to this arrangement, Judge Guerin called in Carroll and Sloane, J. J. (N.T. 279), to sit with him as a court en banc. **Petitioner's counsel made no request either at the pre-trial conference (N.T. 279), or at any other time (N.T. 280) for the appointment of a psychiatrist to assist them in the preparation and presentation of the cause (N.T. 280)**[10]; (see also, **Com. ex rel. Smith v. Ashe,** supra, at p. 99 of 364 Pa.).

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[10] Mr. Levin testified at the hearing, before Judge Welsh, on October 6, 1949, that a week or ten days prior to September 21, 1948, he, Mr. Berkowitz and Assistant District Attorney McClain, to whom the indictment had been assigned for prosecution, called upon Judge Guerin (N.T. 238), at which time counsel informed him of their inability to secure the evidence from the State of New York (N.T. 239), **their unsuccessful efforts to secure the appointment of a commission under the Mental Health Act of 1923 to inquire into relator's sanity** (N. T. 239), their appointment as counsel, under the Act of March 22, 1907, P. L. 31, 18 P. S. Section 784 (N.T. 239), **and requested the appointment of a psychiatrist to determine his sanity at that time** (N.T. 239). As a result of this conference, it was agreed by all that a plea of guilty generally would be entered (N.T. 240), the Commonwealth would produce its evidence, the petition under the Uniform Act to Secure Attendance of Witnesses from Within or Without the State in Criminal Proceedings, Act of June 23, 1941, P. L. 147, 19 P. S. Section 622.1, et seq., to secure the de-

After the matter was fully explained to the petitioner by his counsel, and his consent to the proposed course given (N.T. 243), on September 21, 1948, the former plea of not guilty was withdrawn and a plea of guilty generally entered (1a-2a, N.T. 242), the Commonwealth put in its evidence (10a-76a), a petition to secure the desired records from the mental institutions in the State of New York was presented and granted (4a-10a), and the case **continued** until October 27, and then to October 28, 1948 (77a), at which time the petitioner introduced the testimony of Dr. Fred Adams, a psychiatrist connected with the Kings County Hospital, Kings County, New York (77a), who had, in May or June of 1945 (78a), together with a psychiatrist and psychologist of that institution (82a) at the request of the County Court of Kings County, New York (83a), examined the petitioner (82a), diagnosed his mental condition as "psychosis, schizophrenia, hebephrenic type" (82a), a "men-

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sired evidence from the State of New York would be presented and allowed (N.T. 241), and the case continued to a day certain in October (N.T. 241). **Mr. Levin was under the impression, as a result of this conference, that if the evidence from the State of New York created an issue with respect to the relator's sanity, that the Court would permit the plea of guilty to be withdrawn and some method adopted to ascertain his mental condition (N.T. 241).**

tal disturbance characterized usually by illusions, hallucinations referable to the idea of persecution or grandeur" (82a), concluded that he was then "insane, not imbecile, and * * * [was] not capable of understanding the charge against him, the proceedings against him and of making his defense" (83a), and recommended that he "be committed to a hospital for the insane such as Brooklyn State Hospital, for the treatment of his mental condition" (83a).

As a result of this recommendation, on June 18, 1945, Honorable Nathan R. Sobel, County Judge of Kings County, New York, by an order entered in **People v. James Smith,** on an indictment at No. 441 of 1945, committed the appellant to the Brooklyn State Hospital **"until he shall no longer be in such state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or the proceedings or of making his defense, when he shall be returned to this court for disposition to the said indictment."** (118a-122a).

Dr. Clarence H. Bellinger, Senior Medical Director of the Brooklyn State Hospital, Brooklyn, New York (80a), testified that the petitioner was admitted to that institution on June 19, 1945, was examined by a psychiatrist and the diagnosis of the Kings County Hospital sub-

stantially confirmed (94a) except that the psychosis was concluded to be "catatonic" rather than "hebephrenic" (94a); that the petitioner improved while at that institution (94a), and, **as a result of an examination by the witness on October 9, 1945 (94a), was, pursuant to an order of the committing court entered on October 10, 1945,**" released to the New York City authorities on October 11, 1945 (94a) **"as having recovered from any mental illnesses which he had. He was clear and lucid"** (95a).

Records of the Brooklyn State Hospital (110a-140a) and a letter from Albert K. Kaplan, Md., Assistant Chief of the Neuro-psychiatric Department of the Philadelphia General Hospital,

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[11] "[9] The order reads as follows: ' . . . Now, on reading and filing the certificate of Dr. Clarence H. Bellinger, Director of the Brooklyn State Hospital, dated October 9th, 1945, that the said **James Smith has recovered from his mental illness so that at the present time he understands the nature of the charges against him and is able to confer with counsel in the preparation of his defense, it is ordered,** that the Director of the Brooklyn State Hospital be, and he hereby is, authorized and directed to deliver the said James Smith to the Department of Corrections of the City of New York, who shall convey said defendant and confine him in the City Prison, Brooklyn, **until he is recalled for judgment on the conviction herein.**' " (See **Commonwealth ex rel. Smith v. Ashe**, 364 Pa. 93, 105, f.n. 9).

to Mr. Levin, under date of April 28, 1948 (140a-143a), stating that the petitioner was admitted to that institution on December 27, 1945, upon his own application, at which time he was in an **acutely hallucinatory state following excessive indulgence in alcohol** and was discharged on January 4, 1946, when his condition upon admission, was diagnosed as "Acute Alcoholic Hallucinosis (142a)", as well as a letter from Dr. Henry F. Page, Medical Director of the Philadelphia County Prison, to Assistant District Attorney McClain, dated **March 8, 1948,** a carbon copy of which was sent to Dr. Baldi, the Superintendent, stating, inter alia: **"No evidence of acute psychosis at this time"** (143a-144a) were received into evidence.

At this stage of the proceeding, petitioner's counsel suggested to the court that, in view of the evidence adduced, the appellant was **"entitled to have some psychiatrist examine him"** (107a), **in which the court acquiesced** (108a). The proceeding was adjourned to November 5, 1948.

Dr. William Drayton, Jr., Chief of the Neuropsychiatric Department of the Philadelphia General Hospital (147a), was requested by the trial court to examine the petitioner, which he did (145a), having read the prior testimony

(146a) including the records from the Brooklyn State Hospital, which had been placed in evidence in the prior proceedings (155a).

Dr. Drayton testified at the adjourned hearing in answer to **Judge Guerin's direct question "Q. What is your diagnosis? A. He is of average intelligence, no psychosis, psychotically and neurologically negative"** (147a), **and that, in his opinion, was not only sane at the time of the commission of the crime charged in the indictment, but was then, on November 5, 1948, sane** (164a).[12] Petitioner's counsel were not only

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[12] "At the request of Judge Guerin the defendant had been examined a few days before November 5, 1948, by Dr. William Drayton, Jr., and his testimony is as follows: 'The guard in number four block at the Holmesburg Prison told me, over the telephone, that he acts in a normal manner, is pleasant and cooperative. Smith has a convenient memory loss. He shows no evidence of having any psychosis at this time, nor do I believe that he was psychotic when he shot and killed John J. Haines . . .' When Dr. Drayton was asked: 'What is your diagnosis?', he answered: 'He is of average intelligence, no psychosis; psychotically and neurologically negative.' Dr. Drayton said that as far as he could tell the defendant had completely recovered from any mental illness of which there had been any prior history. He was asked: 'At the time you examined him did he appreciate the difference between right and wrong'? His reply was: 'He answered my question, "What happens to a person who kills," life for life.

permitted to extensively cross examine Dr. Drayton (147a-164a), but also allowed to place into the record the petitioner's hospitalization record in the Armed Forces of the United States (166a-168a), as well as lay testimony relevant to his history from birth up to the date of the crime (168a-208a).

On February 4, 1949,[13] the petitioner was adjudged guilty by the Court of Oyer and Terminer of Philadelphia County, Pennsylvania, of mur-

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He said wrong to kill and he said he didn't kill anybody.' When asked: 'Would you say this man when he says he hears voices is a faker?' he replied: 'I think he is a faker.' When asked: 'You are not quite entirely convinced that this man is sane?', he replied: 'I believe that he is sane.' Judge Carroll asked Dr. Drayton the following question: 'In your professional opinion was this man, on January 15, 1948, capable of distinguishing between right and wrong?' He replied: 'I believe he was.' '' **Commonwealth v. Smith**, 362 Pa. 222, 226-227, 66 A. 2d 764.

[13] The docket entry on page 2a of the printed record in the Supreme Court of Pennsylvania in the case of **Commonwealth v. James Smith**, No. 137 January Term, 1949, erroneously states that the petitioner was adjudged guilty of murder in the first degree on September 21, 1949. This error was perpetuated in the appellant's [petitioner] paper book and is undoubtedly the reason for the statement of Mr. Chief Justice Maxey in Commonwealth v. Smith, at page 223 of 362 Pa. in conformity therewith.

der in the first degree and sentenced to death.[14] The judgment and sentence were affirmed by the Supreme Court of Pennsylvania on June 24, 1949, **Commonwealth v. Smith,** 362 Pa. 222, 66 A. 2d 764.

An application for executive clemency was made to the Pennsylvania Board of Pardons, **and after an investigation of his sanity** (N.T. 322), refused on September 21, 1949.

The collateral proceedings detailed in the statement were then immediately started.

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[14] 227a, 20a Appx. to Respondents' Brief.

SUMMARY OF ARGUMENT

1. "In so delicate a matter as interrupting the regular administration of the criminal law of the State by this kind of attack, too much discretion cannot be used, and it must be realized that it can be done only upon definitely and narrowly limited grounds." Holmes, J., in **Ashe v. Valotta,** 270 U. S. 424, 426.[15]

> "The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of the State in which the constitutional rights of a prisoner could have been claimed and maybe were rightly decided, or if not rightly decided, could be reviewed and redressed by a writ of error from this court."
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> **Markuson v. Boucher,** 175 U. S. 184, 187.

[15] Reversing the judgment of the District Court granting a writ of habeas corpus to a prisoner under sentence of death which had been affirmed by the Supreme Court of Pennsylvania, 279 Pa. 84, 123 A. 681.

See also **Darr v. Burford**, 339 U. S. 200, 207.

"But it must be remembered that habeas corpus is a collateral attack by the courts of Federal jurisdiction invading the province of State jurisdiction, * * *. **We should not lose sight of the fact that the Federal courts are being used to invade the sovereign jurisdiction of the States, presumed to be competent to handle their own police affairs, as the Constitution recognized when the police power was left with the States. We are not super-legislatures or glorified parole boards. We as courts look only to the violation of Federal Constitutional rights. When we condemn a State's exercise of its jurisdiction and hold that the exercise of its powers is not in accordance with due process, we are in effect trying the States. It is State action that is on trial, and a decent regard for the coordinate powers of the two governments requires that we give due process to the state.** That is the reason that in habeas corpus cases the relator must first show that he has exhausted his State remedies to open the way for the Federal courts to try the State's exercise of its sovereign power. **For after all, the States**

represent the people more intimately than the Federal Government.

"To redress an alleged imbalance between the State's exercise of its power and the rights of the individual, the Federal courts exercise a delicate function, the importance of which points up our duty to consider the imbalance in the light of the rights of organized society through the State Government, representing all the people, as against the relator-defendant. There is no room here for crusades or the fulfillment of missions. We are to hold the balance true."

Minton, J., **Feeley v. Ragen**, 7 Cir., 166 F. 2d 977, 981

2. In passing upon an application for a writ of habeas corpus, the District Court has not only a **right**, but also a **duty** to consider records of trial proceedings, not only in its own court, but also other courts.

Dorsey v. Gill, D. C. Cir., 148 F. 2d 857, 870, cert. den. 325 U. S. 890;

See also **Darr v. Burford**, 339 U. S. 200, 215.

3. All of the issues raised in the application to the District Court were apparent on the face of the record of the trial court and were open to

review on the direct appeal to the Supreme Court of Pennsylvania.[16]

It is not the function of habeas corpus to serve as a substitute for an appeal.[17] The judgment is **res judicata** not only as to the questions raised,[18] but also those which could have been raised.[19].

Although Pennsylvania was not required, under the Fourteenth Amendment to do so (**Woolsey v. Best**, 299 U. S. 1), the Supreme Court of Pennsylvania did, upon the application for a

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[16] The petitioner, in his petition for writ of certiorari at No. 818 October Term, 1949 (transferred to No. 70 October Term, 1950), relied almost entirely on the record before the Supreme Court of Pennsylvania on the direct appeal at No. 137 January Term, 1949.

[17] **Sunal v. Large**, 332 U. S. 174; **Woolsey v. Best**, 299 U. S. 1; **Andrews v. Swartz**, 156 U. S. 212 (capital); **Felts v. Murphy**, 201 U. S. 123 (1906) (capital); **Valentina v. Mercer**, 201 U. S. 131 (capital); **Ex Parte Spencer**, 228 U. S. 652; **Jackson v. Brady** (4 Cir.) 133 F. 2d 476, cert. den. 319 U. S. 746 (capital); **Sanderlin v. Smith**, (4 Cir.) 138 F. 2d 729; see also, the dissenting opinion of Mr. Justice Reed in **Wade v. Mayo**, 334 U. S. 672, 694-695.

[18] **Frank v. Mangum**, 237 U. S. 309, 336; **Ashe v. Valotta**, 276 U. S. 424.

[19] **Morton v. Henderson**, 5 Cir., 123 F. 2d 48, 49; **Jackson v. Brady**, 4 Cir., 133 F. 2d 476, cert. den. 319 U. S. 746.

writ of habeas corpus, re-examine and determine all of the issues—both factual and legal—raised in the application to the District Court in this proceeding.[20] That determination in the absence of reversal by this court, was controlling in subsequent habeas corpus proceedings in the United States Court.[21]

5. Where there has been a square determination on the merits by the highest State Court with denial of certiorari by this Court, in the absence of extraordinary circumstances[22] (**Moore v. Dempsey,** 261 U. S. 86) the issues should not

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[20] 96 F. Supp. 104; 192 F. 2d 544.

[21] **Frank v. Mangum,** 237 U. S. 309 (capital case); **Ashe v. Valotta,** 270 U. S. 424 (capital case); **Salinger v. Loisel,** 265 U. S. 224; **Wong Doo v. United States,** 265 U. S. 239; **Pope v. Huff,** D.C. Cir., 141 F. 2d 727; **Karpathiou v. Jordan,** 7 Cir., 153 F. 2d 811; **Swihart v. Johnston,** 9 Cir., 150 F. 2d 721; **Dorsey v. Gill,** D.C. Cir., 148 F. 2d 857, cert. den. 325 U. S. 890; Cf., **Wells v. United States,** 5 Cir., 158 F. 2d 833; **Sander v. Johnston,** 9 Cir., 11 F. 2d 509; **Pagett v. McCauley,** 9 Cir., 95 F. 2d 839; **Rolfe v. Lloyd,** 9 Cir., 102 F. 2d 606; **Bergdoll v. Drum,** 2 Cir., 107 F. 2d 897.

[22] The death sentence has not been regarded as constituting an extraordinary circumstance: **Weber v. Ragen,** 7 Cir., 176 F. 2d 579, cert. den. 338, U. S. 809; **Ex Parte Adamson,** 9 Cir., 167 F. 2d 996 cert. den. 334 U. S. 834; **Bird v. Smith,** 9 Cir., 175 F. 2d 260; **Brown v. Allen,** 4 Cir., 192 F. 2d 477; **Speller v. Allen,** 4 Cir., 192 F. 2d 477; **Daniels v. Allen,** 4 Cir., 192 F. 2d 763.

be inquired into upon habeas corpus in the United States Courts.[23]

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[23] **House v. Mayo**, 324 U. S. 42, 48; **White v. Ragen**, 324 U. S. 760, 764-765; **Parker, Limiting the Abuse of Habeas Corpus**, 8 F.R.D. 171, 173-174, 178.

Second Circuit: Monsky v. Warden of Clinton State Prison, 163 F. 2d 978, cert. den. 332 U. S. 848; **Morrison v. Foster**, 175 F. 2d 495, 497; **Steele v. Jackson**, 171 F. 2d 432, cert. den. 336 U. S. 939; **Schechtman v. Foster**, 172 F. 2d 339, cert. den. 339 U. S. 924.

Fourth Circuit: Brown v. Allen, 192 F. 2d 477; **Goodman v. Swenson**, 173 F. 2d 349; **Adkins v. Smyth**, 188 F. 2d 452; **Bernard v. Brady**, 164 F. 2d 881, cert. den. 332 U. S. 856; **Haughey v. Smyth**, 170 F. 2d 68; **Goodwin v. Smyth**, 181 F. 2d 498; **Edmondson v. Wright**, 177 F. 2d 719, cert. den. 338 U. S. 944; **Holiday v. State of Maryland**, 177 F. 2d 844; **Speller v. Allen**, 192 F. 2d 477; **Daniels v. Allen**, 192 F. 2d 763.

Fifth Circuit: Bailey v. Stoutamire, 155 F. 2d 754.

Seventh Circuit: Parker v. Carey, 135 F. 2d 205, 320 U. S. 755; **Weber v. Ragen**, 176 F. 2d 579, cert. den. 338 U. S. 809; **Holderfield v. Ragen**, 170 F. 2d 189, cert. den. 336 U. S. 906.

Eighth Circuit: Mart v. Lainson, 169 F. 2d 1016.

Ninth Circuit: Bird v. Smith, 175 F. 2d 260; **Moore v. Smith**, 164 F. 2d 483.

ARGUMENT

The Issues Raised in the Application Were All Open to Review on the Direct Appeal

(a) Scope of review by the Supreme Court of Pennsylvania

"In all cases of **felonious homicide**, and in such other criminal cases as may be provided by law, the accused, after conviction and sentence, may remove the indictment, record, and all proceedings to the Supreme Court for review."[24] (Emphasis supplied).

That Court has, under Section 13 of the Act of May 22, 1722, 1 Sm. L. 131,[25] 17 Purdon's Penna. Statutes Annotated Section 41 (Historical Note)

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[24] Article 5, Section 24, Constitution of Pennsylvania; See also, Section 1, Act of February 15, 1870, P. L. 15, 19 Purdon's Penna. Stat. Annotated, Sec. 1186.

[25] "And that the said Judges [of the Supreme Court] or any two of them, shall have full power to hold the said court, and therein to hear and determine all causes, matters and things, cognizable in the said court, * * * and to examine and correct all and all manner of errors of the Justices and Magis-

and Section 1 of the Act of June 16, 1836, P. L. 784[26] Purdon's Penna. Statutes Annotated Section 41, the power "to minister justice to all persons."[27] When the occasion demands, the Supreme Court of Pennsylvania will exercise its

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trates of this province, in their judgments, process and proceedings in the said courts, as well in all pleas of the crown * * * and thereupon to reverse or affirm the said judgments, as the law doth or shall direct * * *."

[26] "The supreme court of this commonwealth shall have power to hear and determine all, and all manner of pleas, plaints, and causes which shall be brought, or removed there from any other court of this commonwealth, by virtue of any writ or process issued by the said court, or any judge thereof, for that purpose, in the manner now practiced and allowed, **to examine and correct all and all manner of errors of the** justices, magistrates, and **courts of this commonwealth, in the process, proceedings, judgments and decrees, as well in criminal as in civil pleas or proceedings, and thereupon, to reverse, modify, or affirm such judgments and decrees, or proceedings, as the law doth or shall direct; and generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted concerning all and singular the premises according to law, as fully and amply, to all intents and purposes whatsoever, as the Justices of the Court of King's Bench, Common Pleas, and Exchequer, at Westminster, or any of them, may or can do.**" (Emphasis supplied)

[27] **Commonwealth v. Ragone**, 317 Pa. 113, 127, 176 Atl. 454.

full powers "to minister justice" and protect personal rights "by speedy and summary interposition."[28]

(b) The issues presented by the application were whether the applicant had been denied due process of law by:

(1) The failure of the trial court to appoint counsel in advance of arraignment, where the plea, on arraignment, was "not guilty" and the trial did not occur for sev-

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[28] "As the only question now before us is: 'Does a writ of coram nobis lie?' we could end this opinion by a negative answer to that question. **But since no appeal to this court was taken from the judgment of conviction of murder, and since counsel who now represents the defendant maintains that a great injustice was done the latter; and since this court if convinced in any case brought before it that a grievous wrong has been done therein will promptly take appropriate measures to undo it, we have carefully reviewed the record to ascertain whether or not the defendant was legally convicted of the crime charged. Our conclusion is that he was and that the evidence completely supports the verdict.**" (**Commonwealth v. Harris**, 351 Pa. 325, 333, 41 A. 2d 688) (Emphasis supplied). See also, **Commonwealth v. Ragone**, 317 Pa. 113, 127-128, 176 Atl. 454; **Commonwealth v. Jones**, 303 Pa. 551, 154 Atl. 480; **Commonwealth v. Loomis**, 267 Pa. 438, 447-448, 110 Atl. 257; Cf., **Commonwealth v. Senauskas**, 326 Pa. 69, 191 Atl. 167.

eral months following the appointment of counsel;

(2) By the failure of the court to direct a withdrawal of the plea of "guilty" and submit the question of petitioner's sanity to a special jury;

(3) By the refusal of the trial court to appoint a psychiatrist to assist the petitioner in the preparation and presentation of his defense; and

(4) By adjudicating the petitioner guilty of murder in the first degree after hearing only the testimony of the prosecution and refusing to hear any evidence thereafter except on the issue of penalty.

These will be discussed seriatim.

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(1)

If the petitioner's counsel had felt that the petitioner had been prejudiced by the entry of his plea of "not guilty" on the arraignment, he could have moved for the withdrawal of it, thereby specifically keeping the record open for review.[29] The docket entries, however (1a), clear-

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[29] Cf., **Taylor v. Commonwealth**, 109 Pa. 262.

ly disclose that counsel had not been appointed until after the arraignment. If the prejudice which the petitioner now asserts actually did occur (the respondents assert that it did not), it was counsels' duty to present that matter to the Supreme Court of Pennsylvania on the direct appeal. **The entry of the plea did not deprive the petitioner of due process of law.**[30] Actually, however, the petitioner suffered no prejudice. Even had counsel been exhaustively familiar with the 1945 commitment proceedings in Kings County, New York, on an indictment at No. 445 of 1945, Kings County, sub nom **People v. James Smith**, it is difficult to understand how that knowledge would have been of any benefit to the petitioner although it had been presented to the court on arraignment. **The action of the New York Kings County Court approv-**

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[30] **Canizio v. New York**, 327 U. S. 82; **Ruben v. Welch**, 4 Cir., 159 F. 2d 493, cert. den. 331 U. S. 814; **Setser v. Welch**, 4 Cir., 159 F. 2d 703, cert. den. 331 U. S. 840; **Holloway v. Welch**, 4 Cir., 160 F. 2d 575; **Wilfong v. Johnston**, 9 Cir., 156 F. 2d 507; **McJordan v. Huff**, D.C. Cir., 133 F. 2d 408; **Council v. Clemmer**, D. C. Cir., 177 F. 2d 22, cert. den. 338 U. S. 880; **In Re Reed**, D. C. Cir., 158 F. 2d 323; **Dorsey v. Gill**, D. C. Cir., 148 F. 2d 857, cert. den. 325 U. S. 890; **Alexander v. United States**, D.C. Cir., 136 F. 2d 783; Cf., **Gann v. Pescor**, 8 Cir., 164 F. 2d 113; **Hiatt v. Gann**, 5 Cir., 170 F. 2d 473; **Williams v. Swope**, 9 Cir., 186 F. 2d 897.

ing the findings of the Brooklyn State Hospital that the petitioner had recovered from his temporary disability sufficiently to permit proceedings on the indictment, (see footnote 11) was an adjudication of restoration, in conformity with the requirements of due process[31]. Presumptively, therefore, the petitioner was mentally competent when called upon to plead to the indictment[32]. The validity of the presumption is persuasively confirmed by the opinion of Dr. Page, the medical director of the Philadelphia County Prison, expressed in a letter to the Assistant District Attorney, dated March 8, 1948, the refusal of Dr. Baldi, the Superintendent of that institution, to initiate an inquiry under the Mental Health Act of 1923, supra, the testimony of Dr. Drayton at the trial,[33] the examination by the Pennsylvania Board of Pardons,[34] the testimony of Dr. Baldi in the proceedings before the District Court at M-1334[35] as well as certain

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[31] Cf. **Nobles v. Georgia**, 168 U. S. 398; **Solesbee v. Balkcom**, 339 U. S. 9.

[32] See concurring opinion of District Judge Bard, **United States ex rel. Smith v. Warden of Philadelphia County Prison** at p. 342 of 87 F. Supp.; **Commonwealth ex rel. Smith v. Ashe et al.**, at pp. 107-109 of 364 Pa.

[33] See 145a-177a.

[34] See N.T. 322, 342.

[35] See N.T. 342-347.

documentary exhibits introduced therein[36] which may be appropriately considered.[37] **In the aggregate, it all adds up to a conclusion that any preliminary inquest either prior to arraignment or after arraignment would have merely confirmed the presumption of mental competency which was necessarily admitted by the plea of guilty. Furthermore, the petitioner was not, as his counsel appear to assume, entitled to a preliminary inquiry, as a matter of right,**[38] or, to state it differently, whether or not an inquiry should be undertaken lay within the sound discretion of the court. When a doubt concerning petitioner's mental condition arose, the court appointed an impartial psychiatrist, to examine the appellant and report to the court. It was the opinion of this expert that the petitioner was, at the time of the crime, arraignment and trial,

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[36] See N.T. 324-334, 356.

[37] See **United States v. Chandler**, 72 F. Supp. 230, 238, affirmed 171 F. 2d 921, cert. den., 336 U. S. 918, 69 S. Ct. 640.

[38] "The second basic error of relator's counsel is that if there had been a prior finding of insanity of the prisoner called for trial it is necessary that the question of the prisoner's sanity at the time of the trial be submitted to the jury trying the case or at least that there be some formal adjudication of his sanity. This is not the law." **Commonwealth ex rel. Smith v. Ashe et al.**, supra at pp. 109-110 of 364 Pa. and cases cited in footnotes 43, 44 and 45 post.

mentally competent[39]. Although this occurred after the withdrawal of the plea of not guilty and the entry of the plea of guilty, the petitioner suffered no actual prejudice, for had there been any doubt in the court's mind after the reception of the testimony of the impartial expert concerning his mental competency it would have directed a withdrawal of the plea of guilty[40], declared a mistrial and proceeded on the issue of insanity. The petitioner asserts that the court didn't have the power to do so, but the Supreme Court of Pennsylvania apparently thinks otherwise, f.n. 11, 364 Pa. 107.

Did the trial court determine the petitioner's mental condition in accordance with the generally recognized norms of procedural due process? The answer is **yes.**

It is the rule in Pennsylvania, as in all common law jurisdictions, that a person charged with a crime, although he may have been sane when the crime was committed, may not be called upon to plead or be placed on trial, if, in the interim, he has become insane[41]. At the com-

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[39] See footnotes 54 and 55 infra.

[40] See footnote 11, pp. 106-107 of 364 Pa. and also N.T. 284, 289, 295, 296, 300.

[41] **Commonwealth v. Endrukat,** 231 Pa. 529, 533-534, 80 Atl. 1049; **Commonwealth v. Scovern,** 292 Pa. 26, 29, 140 Atl. 611; **Commonwealth v.**

mon law, if there were any doubt in the court's mind concerning the prisoner's sanity when called upon to plead, arising from personal observations, information received from others, motions or suggestions by the prosecution or defense counsel, the issue was frequently submitted to a special jury to satisfy the court's conscience[42]. Whether or not a preliminary inquiry would be made lay within the sound discretion of the court.[43] If the court were of opin-

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Ragone, 317 Pa. 113, 124-126; 176 Atl. 454; **Commonwealth ex rel. Smith v. Ashe**, 364 Pa. 109.

[42] **Webber v. Commonwealth**, 119 Pa. 223, 236-237, 13 Atl. 427; **Youtsey v. United States**, 6 Cir., 97 Fed. 937, 943.

[43] **Youtsey v. United States**, id.; **State v. Harrison**, 36 W. Va. 729, 15 S.E. 982; **State v. Arnold**, 12 Iowa 479; **Jones v. State**, 13 Ala. 153; **United States v. Chisolm**, 149 Fed. 284; **State v. Khoury**, 149 N.C. 454, 62 S.E. 638; **State v. Stone**, 111 Ore. 227, 226 Pac. 430; **State v. Kelley**, 74 Vt. 278, 52 Atl. 434; **State v. Peterson**, 90 Wash. 479, 156 Pac. 542; **State v. Fabisinski**, 111 Fla. 454, 152 So. 267; Cf. **People v. Esposito**, 287 N.Y. 389, 39 N.E. 2d 925; **Whitfield v. State**, 236 Ala. 312, 182 So. 42; **Wilhite v. State**, 158 Ark. 290, 250 S.W. 31; **People v. Loomis**, 170 Cal. 347, 149 Pac. 581; **People v. Rice**, 83 Cal. App. 55, 256 Pac. 450; **Boyd v. People**, 108 Colo. 289, 116 P. 2d 193; **People v. Maynard**, 347 Ill. 422, 179 N.E. 833; **Davidson v. Commonwealth**, 171 Ky. 488, 188 S.W. 631; **Murrell v. Commonwealth**, 291 Ky. 65, 163 S.W. 2d 1; **State v. Messer**, 194 La. 238, 193 So. 633; **State v. Schlaps**, 78 Mont. 560, 254 Pac. 858; **Johnson v. State**, 73 Okl.

ion that a preliminary inquiry should be undertaken, the method of procedure lay largely within its discretion[44]. The defendant was not entitled, however, to a separate jury trial[45], but the court might proceed to determine the matter itself[46], or submit it to the jury trying the indictment[47].

Pennsylvania follows the common law practice with respect to the determination of insanity at arraignment or trial. Section 67 of the Crim-

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Crim. Rep. 370, 121 P. 2d 625; **State v. Nelson**, 162 Ore. 430, 92 P. 2d 182; **State v. Davis**, 6 Wash. 2d 696, 108 P. 2d 641.

[44] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Scovern**, 292 Pa. 26, 140 Atl. 611; **Youtsey v. United States**, 6 Cir., 97 Fed. 937; **United States v. Chisolm**, 149 F. 284; **United States v. Fore**, 38 F. Supp. 140; **State v. Peacock**, 50 N. J. L. 34, 11 Atl. 270; **Johnson v. State**, 57 Fla. 18, 49 So. 40; **State v. Harrison**, 36 W. Va. 729, 15 S.E. 982; **State v. Khoury**, 149 N.C. 454, 62 S.E. 638.

[45] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Scovern**, 292 Pa. 26, 140 Atl. 611; **Youtsey v. United States**, 6 Cir., 97 Fed. 937.

[46] **State v. Peacock**, 50 N.J.L. 34, 11 Atl. 270; **Whitney v. Zerbst**, 10 Cir., 62 F. 2d 970; **Youtsey v. United States**, 6 Cir., 97 Fed. 937; **United States v. Fore**, 38 F. Supp. 140; **State v. Hagerty**, 152 Minn. 502, 189 N.W. 411.

[47] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Scovern**, 292 Pa. 26, 140 Atl. 611; **Youtsey v. United States**, 6 Cir., 97 Fed. 937; **People v. Farrell**, 31 Cal. 576; **United States v. Fore**, 38 F. Supp. 140.

inal Procedure Act, Act of March 31, 1860, P. L. 427, 19 Purdon's Penna. Stat. Annotated, Section 1352, authorizes the court, when it appears on arraignment that the defendant is not sane—the burden is on the prisoner to call facts to the attention of the court which would shed doubt on indulgence in the presumption of sanity[48] —to impanel a special jury to try the issue[49]. The court, however, is not obliged to follow this course, but may submit the issue to the jury trying the indictment[50], or appoint a commission[51]. It is a matter of discretion—not one of right[52].

Thus, the practice in Pennsylvania is substantially identical with the practice in other non-

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[48] **Commonwealth ex rel. Mulligan v. Smith**, 156 Pa. Superior Ct. 469, 40 A. 2d 701.

[49] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Endrukat**, 231 Pa. 529, 80 Atl. 1049; **Commonwealth v. Ragone**, 317 Pa. 113, 176 Atl. 454.

[50] **Webber v. Commonwealth**, 119 Pa. 223, 13 Atl. 427; **Commonwealth v. Endrukat**, 231 Pa. 529, 80 Atl. 1049.

[51] **Commonwealth v. Iacobino**, 319 Pa. 65, 178 Atl. 823.

[52] "* * * A defendant charged with a crime who invokes a statutory or common law remedy to determine his sanity before trial or after conviction has no constitutional right to be confronted by or cross examine witnesses or the members of the commission appointed to ascertain that fact. Such inquiries are for the determination of a fact apart, separate and

statutory common law jurisdictions in the United States, including the federal jurisdictions.

The practice which has prevailed for centuries in the common law jurisdictions and, hence, is firmly entrenched in the common law juridical concept of due process of law, has, it appears, satisfied the demands of justice. Indeed, the Supreme Court of the United States has impliedly, at least, held that this practice satisfies due process of law. Cf. **Nobles v. Georgia,** 168 U.S. 398, 408-409; **Solesbee v. Balkcom,** 339 U.S. 9.

Nor, is there anything in **Phyle v. Duffy,** 334 U.S. 431, which would, as the petitioner suggests, require or justify the conclusion that the practice in Pennsylvania violates procedural due process. Indeed, as respondents analyze the opinions of this Court in **Phyle v. Duffy,** supra, and **Solesbee v. Balkcom,** supra, it is felt

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distinct from that of guilt of the crime itself, as to which trial or sentence may or may not be ordered. **The appointment is not demandable of right and if it is contended the members appointed are biased or otherwise incompetent, objection, with the reason therefor, should be made to the court at the time of appointment. The court may then determine whether it has made a mistake in the selection of persons to inform its conscience.** * * *" id at p. 69 of 319 Pa. See also cases cited, footnotes 43, 44, 45, supra. (Emphasis supplied).

that **Nobles v. Georgia**, supra, which was cited approvingly by Mr. Justice Kephart in **Commonwealth v. Iacobino**, supra, at p. 72 of 319 Pa., which impliedly approves the practice in Pennsylvania, as well as in other common law jurisdictions of reposing the determination of an accused's mental condition to plead, stand trial, etc., to the discretion of the trial judge, functioning as a court, was unequivocally reaffirmed.

The trial court, as is clearly manifested by the record in the trial proceedings (90a, 91a, 95a, 108a, 165a, 168a, 177a, 182a, 209a), as well as their testimony in the proceedings before the court below at M-1334 (N.T. 269, 273-274, 284, 294-295, 300, 301-303) recognized and discharged their duty to the petitioner in conformity with the requirements of due process. As soon as the evidence created the slightest doubt in the court's mind concerning the petitioner's mental condition to stand trial, it requested Dr. William Drayton, Jr., an expert, to acquaint himself with the past mental history of the petitioner as it appeared in the record of the trial proceedings, examine the petitioner, and report his findings to the court[53]. Dr. Drayton performed this assign-

[53] The court had a right to proceed in this fashion. See: **Commonwealth v. Iacobino**, 319 Pa. 65, 178 Atl. 823; **People v. Linton**, 102 Cal. App. 608, 283 Pac. 389; **Hunt v. State** 248 Ala. 217, 27 So. 2d 186;

ment after having read the prior evidence, including the documentary evidence from the Brooklyn State Hospital, Brooklyn, New York. His report was given in open court—it will be noted that he was called by the court as its witness—(145a) and first examined by Judge Guerin (145a-177a)[54], and later by Judge Carroll

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Wigmore on Evidence, 3rd Ed., Vol. IX, Sec. 2484; **Wigmore on Evidence**, 3rd Ed., Vol. II, Sec. 563; **Beuscher, The Use of Experts by the Courts**, 54 Harvard Law Review, 1105 (1941); **Young v. United States**, 5 Cir., 107 F. 2d 490; **Rule 28**, Fed. Rules of Criminal Procedure, 18 U.S.C.A. Rule 28 (App'x).

[54] "By Judge Guerin:

"Q. Did you examine one James Smith at my request?

"A. Yes, I did. I saw him day before yesterday and yesterday.

"Q. Will you give us the result?

"A. The reason for the second examination was because I did not have the notes of testimony and I did not know just what had happened before, what he had done, except the end result, but I mean what led up to it.

"Q. Did you before the time of the second examination have the advantage of reading the testimony?

"A. Yes.

"Q. Will you state the result?

"A. * * * Smith has a convenient memory loss. He shows no evidence of having any psychosis at this time, nor do I believe that he was psychotic when he shot and killed John J. Haines. * * * He has no psychosis.

(164a)[55]. Petitioner's counsel were accorded the privilege[56] of cross examining the court appointed psychiatrist (147a-166a) and introducing lay testimony. Any doubts which the court might have entertained with respect to the petitioner's mental condition were dispelled by Dr. Drayton's testimony, the accuracy of which

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"Q. What is your diagnosis?

"A. He is of average intelligence, no psychosis; psychotically and neurologically negative." (Emphasis supplied).

[55] "By Judge Carroll:

"Q. In your professional opinion was this man, on January 15, 1948, capable of distinguishing between right and wrong?

"A. I believe he was.

"Q. Was he capable of understanding what he was doing on his own part?

"A. I believe so.

"Q. As of this date is this man capable of distinguishing between right and wrong in your opinion?

"A. I believe he is.

"Q. I would like to ask your reaction. Look at that man now. Notice the motions of his lips. Notice his expression. Doctor, if that man at the present time is compos mentis, is his conduct as we look at him the act of an exhibitionist or an act of the insane?

"A. I believe it is an exhibition."

[56] **Commonwealth v. Iacobino**, 319 Pa. 65, 178 Atl. 823, at pp. 72-73 of 319 Pa.

has been subsequently confirmed by documents prepared by the relator (N.T. 324-334) and admitted into evidence (N.T. 356),[37] the psychiatric examination at the instance of the Pennsylvania Board of Pardons (N. T. 322, 342), and the testimony of Dr. Baldi, the Superintendent of the Philadelphia County Prison (N.T. 342-347).

(2)

It was evident, on the face of the record (106a, 107a, 210a), that the petitioner had not had the assistance of a psychiatrist in the preparation and presentation of his cause. The question was open to review on the appeal. Indeed, it was argued[38], in a left-handed way, probably because

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[37] See **United States v. Chandler**, 72 F. Supp. 230, 238, affirmed 171 F. 2d 921, cert. den., 336 U. S. 918.

[38] "When all of this is added to appellant's conduct at the trial, it seems apparent to us that counsel was in no position to properly cross examine Dr. Drayton or prepare or present the defense, either in establishing insanity as a complete defense or in mitigation of the penalty. We were denied the opinions and guidance of psychiatrists and were compelled to cross-examine Dr. Drayton upon a subject with which we had but a passing knowledge, gleaned from a textbook written for psychiatrists, not lawyers." (pp. 18, 19, Appellant's Brief in the Supreme Court of Pennsylvania at No. 137 January Term, 1949).

the law of Pennsylvania was to the contrary.[59]

(3)

This issue was unquestionably open for review on appeal. Had the matter been called to the attention of the Supreme Court of Pennsylvania it would have either squarely resolved the conflict between the docket entries, as certified to it, and the intention of members of the court en banc as evidenced by the record, and, if convinced that an actual adjudication of the degree had been made before the reception of the petioner's evidence, would have undoubtedly reversed. **Commonwealth v. Johnson**, 348 Pa. 349 355, 35 A. 2d 312.

Neither the docket entries submitted to the Supreme Court of Pennsylvania (1a-3a) nor the initial entries on the bill of indictment[60], reflect the true situation, viz., that the matter was open as to all phases—degree of the crime as well as

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[59] The issue was squarely presented, and rejected by, the Supreme Court of Pennsylvania in **Commonwealth v. Green**, 346 Pa. 172, 29 A. 2d 491; **Commonwealth ex rel. Smith v. Ashe**, 364 Pa. 93, 110, 71 A. 2d 101, cert. den. 340 U. S. 812.

[60] Judges Guerin, Sloane and Carroll state that while the insertions of the date "2-4-49" which appear on the bill of indictment over their signatures reflect what actually occurred, they have no recollection of that material being on there when they signed it.

the appropriate penalty—until all of the evidence was in.

The petitioner's position on this point, and **this conclusively demonstrates the validity of the respondent's contention that it was open to review on appeal,** is based **entirely** on the indictment and Judge Guerin's statement at (76a)[61] made after a colloquy between the court and counsel (75a) during which counsel apparently conceded (75a-76a)[62] that the Commonwealth

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[61] "Judge Guerin: Gentlemen, we have taken the matter under consideration. We feel that there is but one announcement to be made at this time. The order requested in the petition will be made and the return day fixed for Wednesday, October 27th. In the meantime it will be understood that a written statement of the defendant's position will be embodied in the record stating that the purpose of the medical testimony sought to be secured from New York is simply in mitigation of the penalty, and also any other testimony that may be offered by the defendant, and have the statement signed by the defendant and by counsel."

[62] "Mr. Berkowitz: The defendant, prior to the entry of the plea in this case, that is counsel for the defendant understood that with the consent of the Court the defendant would not put in his evidence at this time. There are numerous witnesses in New York City and in Brooklyn, especially hospitals where this defendant was confined, and we have prepared a petition under the Reciprocal Subpoena

had established murder in the first degree[63], as, indeed, it had by the petitioner's voluntary con-

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Act to subpoena the records from New York as well as these various doctors who had charge of this man, and it was our understanding that the District Attorney and the Court approved that we present the petition this morning and fix a date for the defendant's evidence so that we can subpoena the witnesses from New York, the practice being that we get a certificate from this Court and then we must take it to the Supreme Court of New York, by a Judge of that Court, who sends for these people, and that takes two or three weeks, and we therefore ask for a month.

"(Discussion between Court and counsel on the purpose of the petition.)

"Judge Carroll: What I am trying to find out is are you going to offer this evidence in mitigation of punishment or as affecting the degree or grade of crime?

"Mr. Levin: All I can tell you at this time that in my opinion we will be offering it for mitigation purposes.

"(The Court recessed for a conference.)"

[63] "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnaping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. * * *" Sec. 701, The Penal Code, Act of June 24, 1939, P. L. 872, 18 Purdon's Penna. Stat. Annotated, Sec. 4701.

fession (60a-65a)[64], which has not, in any way,

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[64] "By Detective Michael Schwartz, No. 95:

"Q. What is your name, age, and address?

"A. James Corbett Smith. I'm twenty-two. I live at 112 Bainbridge Street.

"Q. Now, James Smith, we want you to make a statement in regard to the shooting of a taxicab driver this morning, January 15, 1948, about 12:20 or 12:30 a.m. You were placed under arrest at that time. I want you to know that whatever you say can be used against you at the time of your trial in court. And if you do make a statement, it will have to be of your own free will—in your own way; and the statement is not being made by you, due to any threats, abuse, or any promise of leniency. Do you understand that?

"A. Yes, sir.

"Q. You still want to make a statement of your own free will?

"A. Yes, sir.

"Q. Go on, James, and tell us just what happened?

"A. I went to Fifth and South. I got in the cab at the cab stand. I told him to take me to Pier 98. I went in the cafeteria, got a bottle of beer. Took a couple of swallows of the beer. The cabbie was waiting. Told him to wait. So I told him to take me to South and Delaware Avenue. He said it was too bumpy on Delaware Avenue and so he went out Front and Bainbridge. East on Bainbridge to Delaware.

"As he turned the corner I told him it was a holdup. I pointed the gun at him and he bent over as though he was reaching for something, so I shot him. The cab was still in motion. I jumped over to the front seat and tried to find the ignition. I

ever been challenged. Judge Guerin's statement

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couldn't find it so I put my foot on the brake. Stopped the car. At the time, a tow truck swung around.

"The tow truck driver was in the truck. He got out. At the time, he took a lug wrench in his hand and he got out of the other side of the tow truck and came around the front part of the tow truck. And he took a hold of me and hailed another cab that was coming down. And he told the other cab driver to hold me. But the other cab driver said, 'No, I won't hold him, I want to look at the man'—meaning the driver in the cab, that I shot. So he went to the cab and looked at the cab driver. And he came back again and said he was bleeding. By that time the red car came up.

"So the red car came up. The gun was on the seat of the cab. The cop picked up the gun on the seat. I was in the red car at the time. I saw the police officer pick the gun up off the front seat. The police officer used a handkerchief to pick up the barrel. So they put me in the Police Car. And after that the whole gang came down and they brought me to the station house.

"Q. Now, James, I'm showing you a blue steel, .32 caliber long, side ejector, Spanish make revolver, with wood check grips, three and-a-half inch barrel, with Serial No. on the bottom, 16738. Is this your revolver?

"A. I took it. Didn't belong to me.

"Q. Is this the revolver that you had at the time that you held up the cab driver, and the revolver [you] shot the cab driver with?

"A. Yes, sir.

"Q. How many bullets did this revolver have?

"A. Six.

at (76a) must be considered not only in its peculiar context but also with subsequent state-

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"Q. How many shots did you fire?

"A. One.

"Q. How long have you had this revolver?

"A. Since the first part of last week.

"Q. When you left home and took this revolver with you; why did you take this revolver with you?

"A. Because I needed some money, and I thought I'd hold somebody up.

"Q. When you told the cab driver that it was a hold up, did the cab driver say anything to you?

"A. No, sir. I had the gun pointed at him. He didn't say anything.

"Q. Did the cab driver pull any money out of his pocket and try to hand it to you?

"A. No, sir. I didn't even mention it to him. I was too nervous and scared-like.

"Q. After you shot the cab driver, what did you do with the gun?

"A. I dropped it.

"Q. Where?

"A. When I grabbed out to find the ignition I dropped it and it landed on the front seat right beside the cab driver on the left side of the cab driver, near the wheel. I dropped it when I reached for the wheel. He was laying over to one side.

"Q. Was the cab in motion?

"A. The cab was in motion.

"Q. When you first got into the cab, did you get in with the intention of sticking up the driver?

"A. At the time, I didn't.

"Q. When did this thought come into your mind, of holding the cab driver up?

"A. When I got down to Pier 98, when I bought the beer.

ments by Judge Carroll (90a)[65]; (165a)[66], and by Judge Guerin (91a)[67], (95a)[68],

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"Q. When you left your home, was this revolver loaded?

"A. It wasn't.

"Q. When did you load it?

"A. When I left the store—the restaurant—on 3rd St.

"Q. When you got into the taxicab at Fifth and South, was the revolver loaded?

"A. Yes, it was.

"Q. Why did you load the revolver?

"A. Because I was going to stick up anybody that come by, as I needed money."

[65] "Judge Carroll: Don't you see what he is doing; he is helping you to prepare your resistance of this when the trial of this case comes, which may not come, when this plea will have to be withdrawn and the defendant will have to be tried."

[66] "Judge Carroll: Don't you think that we observe defendants? Don't you know it is our duty to observe defendants, especially when we are confronted with such a situation as this?"

[67] "Judge Guerin: Mr. Levin, the course that the defendant's case has taken has led the entire Court to believe it would be in the interest of justice if counsel would make a statement of record what they propose to prove and by whom and upon that proposal or offer of proof **we will consider the matter further and announce a decision.** That will save the time of doctors and the Court and everybody else." (Emphasis supplied).

[68] "'Mr. Levin: Shall I proceed to examine him further in the face of that statement? Does that

(108a)[68] (210a)[69], as well as the opinion of the court en banc (211a-227a) which clearly evidences that the **final** adjudication was made **only** after a consideration of **all** evidence and that the

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satisfy any uncertainty which your Honors may have had in regard to the withdrawal of the plea?

" 'Judge Guerin: It does not to my idea.' "

[68] " 'Judge Guerin: This is all argument to be addressed to the court at the proper time. Counsel for the defendant have requested leave to have the defendant examined by a psychiatrist. We have conferred and concluded by reason of the seriousness of the charge, to grant that request. We understand that will conclude your case; so when the request has been complied with and report made there will be nothing to interfere with a full disposition of the case by the court. Is that correct?

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" 'Judge Guerin: Continued to Friday, November 5, 1948, in Room H, 446 City Hall, at 11:00 a.m. Before that time we will have obtained an examination by a psychiatrist to be appointed by the Court and the report will be available to counsel, the Commonwealth and the Court, and on the basis of the **entire record** a final disposition will be made by the Court under general plea of guilty.

"We have before us a report from the Department of Public Health addressed to Mr. Levin, dated April 28, 1948, and we will direct that to be made a part of the record." (Emphasis supplied).

[69] "On request of counsel the Court allows ten days for the filing of briefs in lieu of oral argument and the Court will then set a date for final disposition."

whole matter was open up to conclusion of the trial. This conclusion is corroborated by Judge Guerin's testimony on cross examination at the hearing before District Judge Welsh at M-1334 (N.T. 292-293[70], 296[71]).

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[70] "By Mr. McBride:

"Q. The question was, whether your Honor [Judge Guerin] didn't order that the only effect of the testimony that would be produced subsequent to the 21st would be in connection with the **penalty**, and I direct Your Honor's attention to page 76a.

"A. That is the effect of it, yes."

"Q. You mean that the Court, while the degree of the offense was still open on the record on a general plea of guilty, is it Your Honor's understanding that this Court was willing and did accept the stipulation that would restrict its evidence no matter what it was so that the Court could consider it only in mitigation of penalty?

"A. **Of course, that mitigation would relate to mitigation of penalty for manslaughter or second degree, too.**"

[71] "By Mr. McBride:

"Q. Suppose the evidence created a doubt and didn't satisfy Your Honor by a preponderance of the evidence that the man was insane, what would Your Honor conceive to be your duty under that circumstance?

"A. My individual judgment would be a mistrial should be declared.

"The Court: Now?

"The Witness: No, he asked a hypothetical question if the evidence had indicated what he said, what I would have done.

"The Court: Oh, very good.

All of the issues raised by the application to the District Court were open to review on the direct appeal. The reason they were not presented quite obviously is because there was no foundation to them either in fact or in law.

The Issues Presented in the Application to the District Court were Controlled by the decision of the Supreme Court of Pennsylvania

The Supreme Court of Pennsylvania adjudicated, after obvious careful consideration, in its opinion reported at 364 Pa. 93, 71 A. 2d 107, cer. den. 340 U. S. 812, **every one** of the issues presented in the application to the District Court. The respondent submits this brought it squarely within **Frank v. Mangum,** 237 U. S. 309, **Ashe v. Valotta,** 270 U. S. 424, **Salinger v. Loisel,** 265 U. S. 224, and **Wong Doo v. United States,** 265 U. S. 239. That adjudication was not defective, as the petitioner seems to think,

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"By Mr. McBride:

"Q. As I indicated in my previous question, Your Honor said that you were in doubt—

"A. That is right, at the moment. I might say, Mr. McBride, I think any Judge is in doubt or should be in doubt until the termination of **all the evidence in the case before** coming to a conclusion."

merely because the Supreme Court of Pennsylvania disposed of the issues raised by the application for a writ of habeas corpus on the basis of its record at No. 137 January Term, 1949[72]. Nor was it defective simply because it considered the testimony taken at the petitioner's insistence in the District Court at M-1334 which, by virtue of its incorporation into the respondent's answer and the Warden's return was before the Supreme Court of Pennsylvania. But, apart from that, there was no reason why the Supreme Court of Pennsylvania could not take judicial notice of it, or at the very least, regard it as a deposition.[73] Moreover, the petitioner has never asserted that he has any additional evidence to present with respect to any relevant and material issue.

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[72] Cf., **Ex Parte Darr**, 84 Okl. Cr. 352, 182 P. 2d 523, which was characterized by Mr. Justice Reed, speaking for the majority in **Darr v. Burford**, 339 U. S. 200, 219, as "obviously careful consideration".

[73] Cf., Section 2246, Revised Judicial Code, 28 U. S.C. 2246:

"Evidence; depositions; affidavits.

"On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants; or to file answering affidavits."

See **Canizio v. New York**, 327 U. S. 82.

In the Absence of an Express Direction From this Court on the Denial of Certiorari the District Court Should Not Have Entertained the Application

Prior to **Darr v. Burford**, 339 U. S. 200, with possibly one exception in the Third Circuit[74] in which the point does not seem to have been considered, the Circuit Courts of Appeals unanimously adhered to the rule enunciated by this court in **Ex Parte Hawk**, 321 U. S. 114, 118[75] (See cases cited in footnote 23, supra).

The respondent argued in the court below that **Darr v. Burford**, 339 U. S. 200, did not impair the rule enunciated in **Ex Parte Hawk** one iota but had, in fact, actually strengthened it by implication, if not expressly, by asserting, we believe, that in the absence of an express direction to proceed in the appropriate Federal court, as was done in **Burke v. State of Georgia**, 338 U. S. 941 the District Courts should decline to en-

[74] **Kennedy v. Burke**, 3 Cir., 173 F. 2d 544.

[75] "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated. * * *"

tertain the application,[76] otherwise the proceedings in the State courts and in this Court by certiorari would be entirely redundant. This would seem to be the logical concomitant of **Frank v. Mangum,** 237 U. S. 309, **Ashe v. Vallotta,** 270 U. S. 424; **Salinger v. Loisel,** 265 U. S. 224, and **Wong Doo v. United States,** 265 U. S. 239. Moreover, unless the respondent's theory is the criterion, the door is wide open to having cases reviewed by this court at least twice[77] and possibly more.

The court below, however, rejected the respondent's argument, and held that the District Court must pass upon the application on the

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[76] "**If this Court has doubts concerning the basis of state court judgments, the matter may be handled as in** Burke v. State of Georgia, 338 U. S. 941, 70 S. Ct. 422, with an express direction that the petitioner may proceed in the federal district court without prejudice from the denial of his petition for certiorari. If the District Court feels that error may have occurred, it has power to examine the application to see if circumstances exist to justify it in holding a hearing on the merits. Such freedom of action protects the Great Writ without trivializing it." 339 U. S. 215, 216 (Emphasis ours)

[77] This case is an excellent illustration. Five of the eight questions before this court in this proceeding are verbatim with questions raised in the application for certiorari at No. 818 October Term, 1949. (Transferred to No. 70 October Term, 1950)

merits. In effect the court below construed Section 2254 of The Judicial Code as an enlargement of Section 2243. Section 2254 **was not** intended as an **enlargement** of Section 2243, but, on the contrary **a restriction** based on the prior judicial practice predicated on the necessity of the elimination of unseemly conflicts between the State and Federal courts. That seems to be the import of **Darr v. Burford**, 339 U. S. 200. There is no statutory impediment, therefore, to the application of the rule since the enactment of The Judicial Code. The proper exercise of discretion would seem to require that applications to the district courts in similar circumstances should be forthwith declined. Honorable John J. Parker, Chief Judge, United States Court of Appeals for the Fourth Circuit, who participated in the drafting of the section of The Judicial Code relating to habeas corpus, appears to be of the same opinion.[78]

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[78] See **Parker, Limiting the Abuse of Habeas Corpus**, 8 F.R.D. 171, 173-174, 178; Cases cited in footnote 23, supra.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

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